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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID H. PICKUP, et al.,

Plaintiffs,

No. 2:12-CV-02497-KJM-EFB

vs.

EDMUND G. BROWN, et al.,

ORDER

Defendants.

Plaintiffs seek to enjoin Senate Bill (SB) 1172 from taking effect on January 1, 2013. The bill prohibits licensed mental health professionals in California from engaging in sexual orientation change efforts (“SOCE”) with minors. Plaintiffs, who are therapists, parents and minors, contend SB 1172 violates their First and Fourteenth Amendment rights. Their motion came on for hearing on November 30, 2012. Plaintiffs were represented by Matt Staver in oral argument, and additionally in the courtroom by Daniel Schmid and Stephen Crampton. Defendants were represented by Deputy Attorney General Alexandra Gordon. Amicus Equality California was represented by David Dinielli and Michelle Friedland in oral argument, and also in the courtroom by Bram Alden, Christopher Stoll, Lika Miyake and Shannon Minter. After careful consideration of the arguments made in the briefs and at argument, and having reviewed the relevant legal authority, the court finds plaintiffs are not likely to prevail on the merits so as

1 to prevail at this stage of the litigation. For the reasons explained below, plaintiffs' motion is
2 DENIED.

3 I. PROCEDURAL HISTORY

4 Plaintiffs in this case are David Pickup, Christopher Rosik, Ph.D., Joseph
5 Nicolosi, Ph.D., and Robert Vazzo, all licensed mental health professionals; the National
6 Association for Research and Therapy of Homosexuality (NARTH); the American Association
7 of Christian Counselors (AACC); Jack and Jane Doe 1, on behalf of minor John Doe 1; and Jack
8 and Jane Doe 2, on behalf of minor John Doe 2. John Does 1 and 2 are patients of Dr. Nicolosi
9 (Decl. of Jack Doe 1 ¶ 10, ECF¹ 28-5; Decl. of Jack Doe 2 ¶¶ 13-14, ECF 28-5). Plaintiffs name
10 the following defendants: Governor Edmund G. Brown, Jr.; Anna Caballero, Secretary of the
11 State and Consumer Services Agency of California; Kim Madsen, Executive Officer of the
12 California Board of Behavioral Sciences; Michael Erickson, Ph.D., President of the California
13 Board of Psychology; and Sharon Levine, President of the Medical Board of California.

14 Plaintiffs' complaint, filed on October 4, 2012, challenges SB 1172, which adds
15 three provisions to California's Business and Professions Code. The new law provides that a
16 mental health provider, as defined by the statute, shall not "engage in sexual orientation change
17 efforts with a person under 18 years of age." Sexual orientation change efforts are defined as
18 "any practices . . . that seek to change an individual's sexual orientation." Plaintiffs assert six
19 constitutional claims, alleging SB 1172 violates: (1) the therapists' right to free speech and the
20 minors' right to receive information under the First Amendment; (2) the therapists' right to
21 liberty of speech and the minors' right to receive information under Article I § 2(a) of the
22 California Constitution; (3) the parents' and minors' right to free exercise of religion; (4) the
23 parents' and minors' right to free exercise and enjoyment of religion under Article I, § 4 of the
24 California Constitution; (5) the Jack and Jane Does' parental rights under the First and

25
26 ¹ ECF refers to "Electronic Case Filing," and the number following it is the docket
number of the document referenced.

1 Fourteenth Amendment; and (6) the Jack and Jane Does' parental rights under Article I, § 7 of
2 the California Constitution. (*See generally* ECF 1.)

3 On October 19, 2012, Equality California filed a motion to intervene as a party
4 defendant. (ECF 24.) Plaintiffs have opposed the motion and Equality California has filed a
5 reply. (ECF 56, 72.) The motion to intervene is resolved by separate order.

6 On October 23, 2012, plaintiffs filed the pending amended motion for a
7 preliminary injunction. (ECF 29.) Defendants have opposed the motion and plaintiffs have filed
8 a reply. (ECF 48, 60.)

9 On November 21, 2012, the court granted Equality California's request to file an
10 amicus brief and to participate in oral argument on the motion for a preliminary injunction.
11 (ECF 67.) Equality California filed its amicus brief on November 21, 2012. (ECF 70.)

12 II. BACKGROUND ON SOCE²

13 As passed by the Legislature, SB 1172 seeks to regulate therapy known as "sexual
14 orientation change efforts," or SOCE (pronounced "sōsh"). "The phrase *sexual orientation*
15 *change efforts* (SOCE) encompasses a variety of methods, including techniques derived from
16 psychoanalysis, behavioral therapy, and religious and spiritual counseling. These techniques
17 share the common goal of changing an individual's sexual orientation from homosexual to
18 heterosexual." (ECF 52 ¶ 26 (emphasis in original).)

19
20 ² This background is drawn from the filings by both parties. The parties have objected to
21 portions of the evidence submitted by their opponents. (*See* ECF 50, 64, 76.) Generally,
22 declarations and evidence supporting a preliminary injunction motion need not conform to the
23 standards for a summary judgment motion or to the Federal Rules of Evidence. *Welker v.*
24 *Cicerone*, 174 F. Supp. 2d 1055, 1059 n. 2 (C.D. Cal. 2001), *abrogated on other grounds by*
25 *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007); *see also* CHARLES ALAN WRIGHT, ARTHUR R.
26 MILLER, MARY KAY KANE & RICHARD L. MARCUS, 11A FED. PRACTICE AND PROCEDURE § 2949
(2d ed. 1995) ("[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial
court should be allowed to give even inadmissible evidence some weight when it is thought
advisable to do so in order to serve the primary purpose of preventing irreparable harm before a
trial can be had."). Because the court's decision here would be the same whether all or none of
the contested evidence is admissible, the court does not rule on objections at this stage of the
litigation.

1 Modern SOCE traces its history to the mid-twentieth century, when
2 homosexuality was considered a form of disease.³ At that time, “many mental health
3 professionals sought to ‘cure’ [homosexuality] using a variety of techniques, including
4 psychotherapy, hormone treatments, aversive conditioning with nausea-inducing drugs,
5 lobotomy, electroshock, and castration.” *Id.* ¶ 27. Use of these practices has dropped
6 significantly in light of the current position of many American psychological and psychiatric
7 professionals that homosexuality is not a mental illness. *Id.* ¶ 28. “[M]ost practitioners [have]
8 stopped attempting to change sexual orientation and some [have taken] strong public stands
9 against such efforts.” *Id.* Plaintiff NARTH’s treatment guidelines recognize SOCE as “an
10 increasingly controversial subject.” (ECF 63-2 at 6.)

11 Despite the documented decline of use in therapeutic practice, “the visibility of
12 SOCE has increased in the last decade.”⁴ (ECF 54-1 at 33.) The American Psychological
13 Association (“APA”) has observed that “most SOCE currently seem[s] directed to those holding
14 conservative religious and political beliefs, and recent research on SOCE includes almost
15 exclusively individuals who have strong religious beliefs.” *Id.* Plaintiff NARTH agrees that
16 deeply religious people account for the bulk of patients now seeking SOCE. (ECF 63-2 at 17.)
17 (“Research indicates that the majority of people who present to clinicians with unwanted
18 same-sex attractions are motivated in part by deeply held religious values.”).

19 Modern day SOCE can be categorized as either aversion or nonaversion
20 treatments, with some practitioners utilizing techniques from both. Aversion treatments include
21

22 ³ Homosexuality was listed as a mental disorder in the first edition of what came to be
23 called the Diagnostic and Statistical Manual of Mental Disorders (“the DSM”), published in
24 1952. (ECF 52 ¶ 11.) Homosexuality was removed from the Manual in 1973. *Id.* ¶ 12. Two
25 years later, in 1975, the American Psychological Association (APA) affirmed that homosexuality
is not a mental illness and urged its membership to work towards dispelling the stigma of mental
illness associated with homosexuality. *Id.*

26 ⁴ The quoted report was published in 2009; “decade” presumably refers to the 10 years
preceding.

1 practices “such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having
2 the individual snap an elastic band around the wrist upon arousal by same-sex erotic images or
3 thoughts. Other examples of aversive behavioral treatments include covert sensitization, shame
4 aversion, systematic desensitization, orgasmic recondition, and satiation therapy.” (ECF 54-1 at
5 30.) Plaintiff NARTH recognizes the controversy aversion treatment presents within the
6 psychological and medical fields, as well as the potential harms to patients presented by such
7 therapies. *See* ECF 63-2 at 29. NARTH’s own treatment guidelines recommend avoiding some
8 aversion treatments. *See id.* (“... in light of current research and professional ethics, some
9 interventions for unwanted same-sex attractions and behavior are not recommended. These
10 include shock therapy and other aversive techniques, so-called reparenting therapies, and
11 coercive forms of religious prayer.”).

12 Nonaversive SOCE treatments center on “chang[ing] gay men’s and lesbians’
13 thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of
14 changing sexual arousal, behavior, and orientation.” (ECF 54-1 at 30.) Such efforts often are
15 accomplished by an accompanying “educational process of dating skills, assertiveness, and
16 affection training with physical and social reinforcement to increase other-sex sexual behaviors.”
17 *Id.*

18 Plaintiff NARTH’s practice guidelines articulate the goal of SOCE as
19 “support[ing] the principle that individuals are capable of making their own choices in response
20 to same-sex attractions and [to] promote autonomy and self-determination.” (*Id.* at 21.)
21 NARTH advises clinicians to accomplish this goal by “(a) acknowledging a client’s choice or
22 desire to seek intervention for unwanted same-sex attractions and behavior; (b) exploring why
23 these attractions and behaviors are distressing to the client...; © addressing the cultural and
24 political pressures surrounding choice in response to same-sex attractions; (d) discussing the
25 available range of professional therapies and resources...; (e) providing understandable

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1 information on outcome research related to change interventions...; and (f) obtaining informed
2 consent for treatment.” *Id.* (citations omitted).

3 III. SB 1172

4 A. The Statute Enacted by SB 1172

5 SB 1172 enacts the following new sections of the California Business and
6 Professions Code:

7 865. For the purposes of this article, the following terms shall
8 have the following meanings:

9 (a) "Mental health provider" means a physician and surgeon
10 specializing in the practice of psychiatry, a psychologist, a
11 psychological assistant, intern, or trainee, a licensed marriage and
12 family therapist, a registered marriage and family therapist, intern,
13 or trainee, a licensed educational psychologist, a credentialed
14 school psychologist, a licensed clinical social worker, an associate
15 clinical social worker, a licensed professional clinical counselor, a
16 registered clinical counselor, intern, or trainee, or any other
17 person designated as a mental health professional under California
18 law or regulation.

19 (b) (1) "Sexual orientation change efforts" means any practices by
20 mental health providers that seek to change an individual's sexual
21 orientation. This includes efforts to change behaviors or gender
22 expressions, or to eliminate or reduce sexual or romantic
23 attractions or feelings toward individuals of the same sex.

24 (2) "Sexual orientation change efforts" does not include
25 psychotherapies that: (A) provide acceptance, support, and
26 understanding of clients or the facilitation of clients' coping,
social support, and identity exploration and development,
including
sexual orientation-neutral interventions to prevent or address
unlawful conduct or unsafe sexual practices; and (B) do not seek to
change sexual orientation.

865.1. Under no circumstances shall a mental health provider
engage in sexual orientation change efforts with a patient under 18
years of age.

865.2. Any sexual orientation change efforts attempted on a
patient under 18 years of age by a mental health provider shall be
considered unprofessional conduct and shall subject a mental
health provider to discipline by the licensing entity for that mental
health provider.

1 B. Legislative History

2 A California State Senator introduced SB 1172 on February 22, 2012, with the
3 stated intention of protecting California lesbian, gay, bisexual and transgender individuals from
4 “sham therapies” that aim to change their sexual orientation. *Senate Judiciary Committee, SB*
5 *1172*, 2011-2012 Sess. 5 (Cal. 2012); Complete Bill History of SB 1172 (Official California
6 Legislative Information maintained electronically by Legislative Counsel of California).

7 Initially, the bill included provisions allowing former or current SOCE patients to sue a therapist
8 engaging in SOCE and requiring therapists who provide SOCE to adult patients to obtain a
9 patient’s signature on an informed consent form. *Senate Committee on Business, Professions*
10 *and Economic Development, SB 1172*, 2011-2012 Sess. 8-9 (Cal. 2012). Prior to final passage,
11 the draft bill was changed to remove these two provisions, leaving the sections set forth above.

12 *Senate Rules Committee: Third Reading, SB 1172*, 2011-2012 Sess. 1 (Cal. 2012). The full
13 Senate passed a version of the bill on May 30, 2012, twenty-three votes to thirteen. Complete
14 Bill History of SB 1172. SB 1172 was then referred to the Assembly, where it cleared
15 committee to reach the floor. *Id.* After amending it several times, the Assembly passed the bill
16 on August 28, 2012, fifty-two to twenty-two. *Id.* The Senate then adopted the Assembly
17 amendments on August 30, on a vote of twenty-three to thirteen. *Id.* The Governor received the
18 bill on September 10 and signed it into law on September 30, 2012. Cal. Stats. 2012, ch. 835, p.
19 91.

20 Amicus Equality California was a primary sponsor of SB 1172, along with several
21 other organizations, including Lambda Legal, Gaylesta, Mental Health America of Northern
22 California and National Center for Lesbian Rights. *Senate Rules Committee: Unfinished*
23 *Business, SB 1172*, 2011-2012 Sess. 7-8 (Cal. 2012). Initially, the California Psychological
24 Association, California Association for Licensed Professional Clinic Counselors, California
25 Psychiatric Association and California Association of Marriage and Family Therapists opposed
26 the bill, on grounds that a statutory ban on a type of therapy was unprecedented, particularly the

1 complete ban on SOCE for minors, even those who freely consent to the treatment. *Senate*
2 *Committee on Business, Professions and Economic Development, SB 1172, 2011-2012 Sess. 9-*
3 *10 (Cal. 2012).* These organizations also expressed concern that the proposed definition of
4 SOCE was too vague. *Assembly Committee on Business, Professions and Consumer Protection,*
5 *SB 1172, 2011-2012 Sess. 4 (Cal. 2012).* Other organizations, including plaintiff NARTH, also
6 opposed the bill. *Senate Rules Committee: Unfinished Business, SB 1172, 2011-2012 Sess. 8*
7 *(Cal. 2012).* The California Psychological Association and California Association of Marriage
8 and Family Therapists eventually supported the bill.⁵ *Senate Rules of Committee: Unfinished*
9 *Business, SB 1172, 2001-2012 Sess. 7 (Cal. 2012).* At the time the bill was delivered to the
10 Governor, it was opposed by the American College of Pediatricians, California Catholic
11 Conference, Inc., Catholic Medical Association, Christian Medical and Dental Associations,
12 Church State Council, Liberty Counsel Action, NARTH, Pacific Justice Institute and Parents and
13 Friends of Ex-Gays and Gays. *Id.* The other professional organizations who had initially
14 opposed the bill, listed above, had withdrawn their opposition. *See id.*

15 During committee hearings, the Legislature addressed a potential conflict with
16 California Health & Safety Code § 124260, which allows minors who are twelve years of age or
17 older to consent to mental health treatments without parental approval. *Senate Judiciary*
18 *Committee, SB 1172, 2011-2012 Sess. 6-8 (Cal. 2012).* The Legislature ultimately concluded
19 that Section 124260 was meant to allow minors to access only helpful treatment and thus that SB
20 1172's goal of protecting minors from harmful treatment was not in conflict. *Id.*

21 In adopting SB 1172, the Legislature expressly relied on mental health
22 professional organizations' research into the safety and efficacy of SOCE, and in particular the
23 report of the 2009 Task Force of the American Psychological Association (APA) titled

24
25 ⁵ At hearing, Equality California requested that the court take judicial notice of a letter
26 from the California Psychological Association expressing its support in light of amendments to
the bill. Plaintiffs' counsel objected because he had not previously seen the letter. The court
declines to take notice of the letter or its contents.

1 *Appropriate Therapeutic Responses to Sexual Orientation*. The Legislature also referenced the
 2 Ninth Circuit Court of Appeals' decision in *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997),
 3 holding that "sexual orientation treatment" of a Russian citizen including "sedative drugs and
 4 hyponosis" constituted mental and physical torture, although the Legislature did not suggest the
 5 treatment in *Pitcherskaia* was akin to current SOCE practices in California. *Senate Rules*
 6 *Committee: Third Reading, SB 1172*, 2011-2012 Sess. 6 (Cal. 2012). The Legislature briefly
 7 documented the history of treatment of homosexuality by mental health practitioners. *Senate*
 8 *Rules Committee: Unfinished Business, SB 1172*, 2011-2012 Sess. 4-5 (Cal. 2012). It noted the
 9 APA's removal of homosexuality from the Diagnostic and Statistical Manual of Mental
 10 Disorders (DSM) list of mental disorders in 1973, *id.* at 4; the further modification of the DSM
 11 in the mid-1980s to eliminate the definition of those "in conflict with" their sexual orientation as
 12 having a mental disorder, *id.* at 5; and the removal of the diagnosis of egodystonic⁶
 13 homosexuality from the DSM in 1987. *Id.* The Legislature also noted the World Health
 14 Organization's removal of homosexuality from its International Classification of Disorders-10 in
 15 1992, and shift to use of the term egodystonic homosexuality. *Id.*

16 The Legislature also reviewed the work of contemporary SOCE practitioners,
 17 including plaintiff Nicolosi's psychotherapeutic techniques, *Senate Rules Committee: Third*
 18 *Reading, SB 1172*, 2011-2012 Sess. 6 (Cal. 2012), as well as NARTH's view that homosexuals
 19 can and should be allowed to change their sexual orientation through therapy, *Assembly*
 20 *Committee on Business, Professions and Consumer Protection, SB 1172*, 2011-2012 Sess. 3
 21 (Cal. 2012).

22
 23 ⁶ The International Classification of Disorders-10 defines "egodystonic sexual
 24 orientation" as: "The gender identity or sexual preference (heterosexual, homosexual, bisexual,
 25 or prepubertal) is not in doubt, but the individual wishes it were different because of associated
 26 psychological and behavioural disorders, and may seek treatment in order to change it." World
 Health Organization, ICD-10, § F66.1 (May 2010).

1 The final version of SB 1172 sets forth the Legislature’s findings, summarized
2 here:

3 • The major mental health professional organizations have recognized
4 homosexuality is “not a disease, disorder, illness, deficiency, or shortcoming” for nearly 40
5 years.

6 • The 2009 APA Task Force report “concluded that sexual orientation change
7 efforts can pose critical health risks to lesbian, gay, and bisexual people,” including among many
8 other effects “confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal,
9 suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and
10 authenticity to others, . . .”

11 • The APA, in a 2009 resolution, advised persons to avoid SOCE.
12 • The APA has resolved that SOCE does not have proven effectiveness and that
13 practitioners should refrain from engaging in the treatment.

14 • The American School Counselor Association, American Academy of
15 Pediatrics, American Medical Association Council on Scientific Affairs, National Association of
16 Social Workers, American Counseling Association Governing Council, American
17 Psychoanalytic Association and Pan American Health Organization of the World Health
18 Organization all have issued statements opposing SOCE.

19 • In a 2012 article, the American Academy of Child and Adolescent Psychiatry
20 advised clinicians “there is no evidence that sexual orientation can be altered through therapy,
21 and [] attempts to do so may be harmful.”

22 • In a 2009 article in the journal *Pediatrics*, documentation supported the
23 conclusion that “[m]inors who experience family rejection based on their sexual orientation face
24 especially serious health risks.”

25 The Legislature concluded that “California has a compelling interest in protecting
26 the physical and psychological well-being of minors, including lesbian, gay, bisexual, and

1 transgender youth, and in protecting its minors against exposure to serious harms caused by
2 sexual orientation change efforts.”

3 IV. MOTION FOR PRELIMINARY INJUNCTION

4 A. Standard

5 Injunctive relief is an extraordinary remedy that may only be awarded upon a
6 clear showing that the moving party is entitled to such relief. *Winter v. Natural Res. Defense*
7 *Council, Inc.*, 555 U.S. 7, 22 (2008). As provided by Federal Rule of Civil Procedure 65, a court
8 may issue a preliminary injunction to preserve the relative position of the parties pending a trial
9 on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The party seeking
10 injunctive relief must show it “is likely to succeed on the merits, . . . is likely to suffer irreparable
11 harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that
12 an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

13 Before the *Winter* decision, the Ninth Circuit employed a “sliding scale” or
14 “serious questions” test, which allowed a court to balance the elements of the test “so that a
15 stronger showing of one element may offset a weaker showing of another.” *Alliance for the Wild*
16 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Clear Channel Outdoor, Inc. v.*
17 *City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). Recently, the Circuit has found that its
18 “serious question” sliding scale test survived *Winter*: a court may issue a preliminary injunction
19 when the moving party raises serious questions going to the merits and demonstrates that the
20 balance of hardships tips sharply in its favor, so long as the court also considers the remaining
21 two prongs of the *Winter* test. *Cottrell*, 632 F.3d at 1134-35. However, a court need not reach
22 the other prongs if the moving party cannot as a threshold matter demonstrate a “fair chance of
23 success on the merits.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (quoting
24 *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2008); internal quotations omitted).

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1 B. Analysis

2 Plaintiffs' motion for preliminary injunctive relief is based only on their first and
3 fifth claims for relief: violation of the therapists' free speech and violation of parental rights
4 under the First and Fourteenth Amendments.⁷ (ECF 28 at 2.) The free speech claim supports
5 three separate arguments: SB 1172 violates plaintiff therapists' rights by discriminating based on
6 viewpoint and/or content; SB 1172 violates plaintiff minors' rights to receive information; and
7 SB 1172 is unconstitutionally vague. The court addresses each of these free speech arguments
8 and then turns to plaintiffs' parental rights argument. Because the court determines plaintiffs do
9 not meet the threshold test of likelihood of prevailing on the merits on any claim, the court
10 addresses each of plaintiffs' arguments only in light of *Winter's* first prong.

11 1. Therapists' Free Speech Rights And Discrimination Based On Viewpoint
12 Or Content

13 Plaintiffs argue that SB 1172 unconstitutionally discriminates on the basis of
14 viewpoint, by prohibiting licensed mental health providers from "even mentioning the viewpoint
15 that unwanted same-sex attractions can be changed"; they say the bill instead mandates that
16 counselors "espouse one viewpoint regarding same-sex sexual attractions, *i.e.*, that they . . .
17 cannot be stopped . . ." Plaintiffs contend this discrimination against a particular viewpoint
18 cannot withstand strict scrutiny, even if the statute is interpreted as merely restricting content
19 rather than viewpoint. (ECF 28 at 8-9.) Defendants respond that SB 1172 is not viewpoint or
20 content discriminatory because the statute regulates conduct, not speech. They argue that SB
21 1172 does not prohibit licensed mental health professionals from mentioning SOCE to minors.

22
23 ⁷ Plaintiffs assert parallel free speech, free exercise, and parental rights claims under the
24 United States Constitution (claims 1, 3, and 5) and the California Constitution (claims 2, 4, and
25 6). Defendants argue in their opposition that claims under the California Constitution are barred
26 by the Eleventh Amendment. (ECF 48 at 24 (citing *Pennhurst State Schs. & Hosp. v. Halderman*, 465 U.S. 89, 106, 119 (1984) (Eleventh Amendment precludes federal courts from hearing claims against state officials on the basis of state law)).) Because plaintiffs do not assert a separate analytical basis for their claims under the California Constitution, this court treats the two claims as identical for the purposes of this motion and does not reach the immunity issue.

1 Defendants also contend SB 1172 does not improperly single out a particular viewpoint because
2 the Legislature did not exclude heterosexual minors from the statute's coverage. (ECF 48 at 18-
3 20.) In reply, plaintiffs urge that defendants have not met their burden in justifying the statute's
4 restrictions on their First Amendment rights. They also argue the statute is not a content-neutral
5 licensing scheme but rather "dictate[s] the content of what is said in therapy." Because
6 "psychotherapy is a series of conversations" and the "relationship between the psychotherapist
7 and client is founded upon speech," they say, SB 1172 regulates speech, not conduct. (ECF 60
8 at 8.)

9 a. Content and Viewpoint Discrimination

10 "Content discrimination occurs when the government chooses the subjects that
11 may be discussed, while viewpoint discrimination occurs when the government prohibits speech
12 by particular speakers, thereby suppressing a particular view about a subject." *Giebel v.*
13 *Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (internal citations, quotation marks omitted).
14 Viewpoint discrimination is a "subset or particular instance of the more general phenomenon of
15 content discrimination [T]he distinction is not a precise one." *Rosenberger v. Rector and*
16 *Visitors of the Univ. of Virginia*, 515 U.S. 819, 830-31 (1995). Whether a statute is content-
17 based may be determined from the text of the statute itself: "if the statute describes speech by
18 content, then it is content based." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1071
19 (9th Cir. 2006). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St.*
20 *Paul*, 505 U.S. 377 (1992).

21 The Ninth Circuit considered content and viewpoint discrimination in *Conant v.*
22 *Walters*, 309 F.3d 629, 634 (9th Cir. 2002), a case upon which plaintiffs rely. In *Conant*, the
23 Circuit addressed whether the government could investigate a physician or revoke a physician's
24 license to prescribe controlled substances when the only basis for such action was the
25 physician's professional recommendation for the use of marijuana. The policy at issue in *Conant*
26 was released by the Director of the Office of the National Drug Policy Council and was

1 formulated after two states decriminalized the use of marijuana for limited medical purposes. *Id.*
2 at 632 n.1. The court described the policy as seeking “to punish physicians on the basis of []
3 doctor-patient communications,” because only those conversations that included a discussion of
4 the medicinal use of marijuana triggered the policy. *Id.* at 637. It found the policy was not only
5 content-based, but viewpoint discriminatory, because it precluded the discussion of marijuana
6 and also condemned the expression of any opinion that marijuana might help a particular patient.
7 *Id.* The court recognized that the First Amendment protects physician speech because “an
8 integral component of the practice of medicine is the communication between a doctor and a
9 patient,” something the law recognizes through the application of the physician-patient privilege.
10 The basis of the privilege, the court said, is that ““barriers to full disclosure would impair
11 diagnosis or treatment.”” *Id.* at 636 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).
12 The government’s policy thus infringed the physician’s First Amendment speech because it
13 prevented the doctor from exercising medical judgment in recommending a form of treatment he
14 or she believed might benefit a patient. *Id.* at 638. *Conant* did not consider whether the
15 government’s restriction on prescribing medical marijuana or using medical marijuana as a
16 treatment would raise any First Amendment concerns.

17 Similarly, in *Wollschlaeger v. Farmer*, No. 11–22026–Civ, 2012 WL 3064336
18 (S.D. Fla. June 29, 2012), a district court considered a Florida statute that prevented a medical
19 care provider from asking a patient about gun ownership and recording any information about
20 gun ownership in a patient’s records, subject to a few exceptions. The court described the act as
21 imposing “content-based restrictions on practitioners’ speech” because it “regulate[s]
22 practitioners’ inquiries [and] record-keeping . . .” on only one subject. *Id.* at *7. It observed
23 that the law was “different from so many other laws involving practitioners’ speech” because “it
24 aims to restrict a practitioner’s ability to provide truthful, non-misleading information to a
25 patient The purpose of preventative medicine is to discuss with a patient topics that . . .
26 informs [*sic*] the patient about general concerns that may arise in the future.” *Id.* at *9. The

1 court in *Wollschlaeger* found that the law burdened the doctor-patient relationship by prohibiting
2 speech necessary to the practice of preventative medicine and thereby preventing patients from
3 receiving truthful, non-misleading information. *Id.* at *12.⁸

4 Here, plaintiffs have not demonstrated a likelihood of success on the merits of
5 their claim that SB 1172 will subject mental health professionals to discipline if they merely
6 recommend SOCE to minor patients, or discuss it with them, or even present them with literature
7 about SOCE. This case is thus unlike *Conant*, where the government was unable “to articulate
8 exactly what speech [was] proscribed, describing it only in terms of speech the patient believes
9 to be a recommendation of marijuana.” *Id.* at 639. Here, in contrast, the state’s insistence that
10 the statute bars treatment only, and not the mention of SOCE or a referral to a religious
11 counselor or out-of-state practitioner, is consistent with a fair reading of the statute itself. (ECF
12 48 at 18-19.)

13 According to the statute, SOCE is any “practices” aimed at changing a person’s
14 sexual orientation. As the law itself does not define either “practices” or “change,” the court
15 construes the terms in accordance with their “ordinary or natural meaning.” *Federal Deposit Ins.*
16 *Corp. v. Meyer*, 510 U.S. 471, 476 (1994); *Human Life of Washington, Inc. v. Brumsickle*, 624
17 F.3d 990, 1021 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1477 (2011). A “practice”
18 is “the application or use of an idea, belief, or method, as opposed to the theory or principles of
19 it,” and the transitive verb “to change” is to “make (a thing) other than it was; to render
20 different.” CONCISE OXFORD ENGLISH DICTIONARY 1126, 236 (12th ed. 2011).⁹ As defined,

22 ⁸ In an earlier order granting the physicians’ motion for a preliminary injunction, the
23 court said the statute restricted a practitioner’s freedom to inquire about or discuss a certain
subject. *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1377 (S.D. Fla. 2011).

24 ⁹ To define statutory terms in this order, the court examined several different
25 dictionaries, including the one cited here and MERRIAM WEBSTER’S COLLEGIATE (10th ed.
26 1996), COMPACT OXFORD ENGLISH DICTIONARY (3rd ed. 2005), WEBSTER’S THIRD NEW
INTERNATIONAL DICTIONARY (1976) and AMERICAN HERITAGE DICTIONARY ONLINE. Because
the court’s survey yielded no material difference in definitions, the court cites to one leading
dictionary.

1 then, what SB 1172 proscribes is actions designed to effect a difference, not recommendations or
2 mere discussions of SOCE. This fact distinguishes SB 1172 from the policy at issue in *Conant*
3 or the law at issue in *Wollschlaeger*, as SB 1172 does not on its face penalize a mental health
4 professional's exercise of judgment in simply informing a minor patient that he or she might
5 benefit from SOCE; it also does not prohibit speech necessary to the therapist's practice.
6 Moreover, the statute does not preclude a minor's taking information from a licensed mental
7 health professional and then locating someone other than a licensed professional to provide
8 SOCE. *Cf. Sorrel v. IMS Health, Inc.*, ___ U.S. ___, 131 S. Ct. 2653, 2665 (2011) (“[a]n
9 individual's right to speak is implicated when information he or she possesses is subjected to
10 ‘restraints on the way in which the information might be used’”) (quoting *Seattle Times Co. v.*
11 *Rhinehart*, 467 U.S. 20, 32 (1984)). The SOCE therapy regulated by SB 1172 is conduct.

12 The court also must determine, however, whether the statute's restriction on
13 engaging in SOCE itself, distinct from discussion or recommendation of SOCE, violates a
14 licensed professional's First Amendment rights as plaintiffs claim.

15 b. First Amendment Rights

16 In making their conflicting arguments with respect to the First Amendment, both
17 parties cite to the Ninth Circuit case of *National Association for the Advancement of*
18 *Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (“*NAAP*”).
19 *NAAP* involved a challenge to provisions of California's licensing laws establishing certain
20 educational requirements for a person to be licensed as a psychologist. The individual plaintiffs,
21 who had not completed all the required courses despite their other, substantial educational
22 accomplishments, alleged that the licensing scheme violated their substantive due process and
23 First Amendment rights. The Circuit first considered the extent to which speech was implicated,
24 noting that a course of conduct may be regulated even if it is “‘in part initiated, evidenced, or
25 carried out through means of language, either spoken, or written, or printed.’” *Id.* at 1053
26 (quoting *Giboney v. Empire Storage & Ice Co.* 336 U.S. 490, 502 (1949)). It rejected NAAP's

1 claim that psychoanalysis is “pure speech,” quoting the district court’s determination that ““the
 2 key component of psychoanalysis is the treatment of emotional suffering and depression, *not*
 3 speech That psychoanalysts employ speech to treat their clients does not entitle them, or
 4 their profession, to special First Amendment protection.”” *Id.* at 1054 (emphasis in original);¹⁰
 5 *see also* STEDMAN’S MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS AND NURSING 1394,
 6 1763 (7th ed. 2012) (defining “psychotherapy” as “[t]reatment of emotional, behavioral,
 7 personality, and psychiatric disorders based primarily on verbal or nonverbal communication and
 8 interventions with the patient, in contrast to treatments using chemical and physical measures”
 9 and “therapy” as the “systematic treatment of a disease, dysfunction, or disorder,” and in
 10 psychiatry and clinical psychology, as “psychotherapy”); CONCISE OXFORD ENGLISH
 11 DICTIONARY 1537 (12th ed. 2011) (defining “treatment” as “management in the application of
 12 remedies; medical . . . application or service” and “action . . . towards a person”); CAL. BUS. &
 13 PROF. CODE § 4996.9 (defining psychotherapy as the use of “methods . . . to assist a person . . .
 14 to achieve a better psychosocial adaptation . . . to modify internal and external conditions which
 15 affect individuals, groups or communities in respect to behavior, emotions, and thinking).

16 At the same time, that therapy is conduct, as discussed above, does not
 17 necessarily mean the First Amendment has no application: “conduct may be ‘sufficiently imbued
 18 with elements of communication to fall within the scope of the First and Fourteenth
 19 Amendments.’” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. State of Wash.*,
 20 418 U.S. 405, 409 (1974)); *Schneider v. Amador Cnty.*, No. CIV S-10-3242, 2011 WL 3876015,
 21

22 ¹⁰ Plaintiffs cite to that portion of *NAAP* finding the licensing scheme to be content-
 23 neutral in part because “[n]othing in the statutes prevents licensed therapists from utilizing
 24 psychoanalytical methods . . . ,” and that the licensing scheme “was not adopted because of any
 25 disagreement with psychoanalytical theory.” *NAAP*, 228 F.3d at 1055, 1056. Plaintiffs argue
 26 that SB 1172 in contrast was adopted precisely because of the state’s disagreement with a
 particular analytical theory and that the law prevents them from using certain psychoanalytical
 methods. While the cited discussion in *NAAP* gives the court pause, it is dicta and does not
 control the resolution of the nature of SOCE therapy for First Amendment purposes in this case,
 given the other controlling precedent this court must apply.

1 at *3 (E.D. Cal. Sep. 1, 2011), *recommendation adopted in* 2011 WL 4766445 (E.D. Cal. Sep.
2 29, 2011). The Supreme Court has rejected the idea that “an apparently limitless variety of
3 conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to
4 express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968); *City of Dallas v. Stanglin*,
5 490 U.S. 19, 25 (1989) (rejecting the idea that every activity with “some kernel of expression” is
6 entitled to First Amendment protection). Instead, it has extended First Amendment protection to
7 conduct only when “[a]n intent to convey a particularized message [is] present, and . . . the
8 likelihood [is] great that the message w[ill] be understood by those who view it.” *Anderson v.*
9 *City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (quoting *Spence*, 428 U.S. at 409-
10 11; process of tattooing entitled to First Amendment protection because the end product, the
11 tattoo, is pure speech); *Giebel*, 244 F.3d at 1187 (handbill entitled to First Amendment
12 protection because it was designed to convey information). “If combining speech and conduct
13 were enough to create expressive conduct, a regulated party could always transform conduct into
14 ‘speech’ simply by talking about it.” *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*,
15 547 U.S. 47, 66 (2006).

16 Courts reaching the question have found that the provision of healthcare and
17 other forms of treatment is not expressive conduct. *O’Brien v. United States Dept. Of Health &*
18 *Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *12 (E.D. Mo. Sep. 28, 2012)
19 (“Neither the doctor’s conduct in prescribing nor the patient’s conduct in receiving
20 contraceptives is inherently expressive. Giving or receiving health care is not a statement in the
21 same sense as wearing a black armband or burning a flag.” (internal citations omitted)); *see*
22 *Abigail Alliance For Better Access v. von Eschenbach*, 495 F.3d 695 (D. D.C. 2007) (collecting
23 cases finding no constitutional right of access to particular medical treatments reasonably
24 prohibited by the government); *Martin v. Campbell*, No. 09-4077, 2010 WL 1692074 (W.D. Ark.
25 Apr. 23, 2010) (rejecting a First Amendment challenge to a statute preventing acupuncturists
26 from prescribing, administering or dispensing certain drugs); *People v. Privitera*, 23 Cal. 3d 697,

1 703-04 (1979) (“the selection of a particular procedure is a medical matter” to which privacy
2 status does not attach); *Sharrer v. Zettel*, No. C 04-00042 SI, 2005 WL 885129, at *7 (N.D. Cal.
3 Mar. 7, 2005) (in rejecting claim that plaintiffs had a constitutional right to consult dentist,¹¹
4 court found no fundamental right to choose type of medical treatment or particular health care
5 provider); *State Dept. of Health v. Hinze*, 441 N.W.2d 593, 597 (Neb. Jun. 16 1989) (practice of
6 medicine itself is not protected by the First Amendment). Given the weight of the authority on
7 the question and the nature of the record before the court, plaintiff therapists have not shown
8 they are likely to succeed in bearing their burden of showing that the First Amendment applies to
9 SOCE treatment; they have not shown that the treatment, the end product of which is a change of
10 behavior, is expressive conduct entitled to First Amendment protection. *See* ECF 54-2 at 12;
11 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) (even though
12 government bears burden of justifying restrictions on First Amendment interests, “it is the
13 obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that
14 the First Amendment even applies”). Accordingly, because plaintiffs have not shown they will
15 be able to establish that SOCE therapy is expressive speech and thus within First Amendment
16 purview, the court need not reach the argument advanced by defendants and amicus Equality
17 California, that SB 1172's restrictions satisfy the intermediate test established in *United States v.*
18 *O'Brien*, 391 U.S. 367, 377 (1968) (requiring showing that incidental burden on First
19 Amendment freedoms is justified by neutral regulation promoting a substantial government
20 interest that would not be achieved as effectively without the regulation).

21 Plaintiffs also are not likely to succeed on the merits of the therapists’ First
22 Amendment claims, given judicial recognition of the state’s role in regulating the medical
23 profession. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 176 (1910) (“There is perhaps no
24 profession more properly open to such regulation than that which embraces the practitioners of
25

26 ¹¹ A dentist is a healthcare provider trained in the use of removable prosthetic
appliances to treat maladies of the human head and neck. *Sharrer*, 2005 WL 885129, at *1.

1 medicine.”); *see also Lambert v. Yellowley*, 272 U.S. 581 (1926) (“High medical authority being
2 in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it
3 would, indeed, be strange if Congress lacked the power to determine that the necessities of the
4 liquor problem require a limitation of permissible prescriptions.”). In *Planned Parenthood of*
5 *Southeastern Penn. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), the Supreme Court
6 rejected a number of challenges to the requirement that doctors provide certain information to
7 women seeking abortions. In a short passage, the Court rejected the doctors’ claim that the
8 regulations compelled speech, saying that a physician’s First Amendment right to speak “as part
9 of the practice of medicine” is “subject to reasonable licensing and regulation by the State.” As
10 one Court of Appeals has observed, *Casey* means that strict scrutiny does not apply to a claim
11 that regulations compelled a physician to provide specified information to women seeking
12 abortions. *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th
13 Cir. 2012) (stating “the three sentences with which the Court disposed of the First Amendment
14 claims are, if anything, the antithesis of strict scrutiny”). *See also Rust v. Sullivan*, 500 U.S. 173,
15 200 (1991) (upholding restrictions on funding for abortion counseling; “The doctor is always
16 free to make clear that advice regarding abortion is simply beyond the scope of the program.”);
17 *NAAP*, 228 F.3d at 1054 (concluding that “[t]he communication that occurs during
18 psychoanalysis is entitled to constitutional protection, but it is not immune from regulation”);
19 *Shultz v. Wells*, No. 2:09cv646-WKW, 2010 WL 1141452, at *9-10 (M.D. Ala. Mar. 3, 2010),
20 *recommendation adopted in* 2010 WL 1191444 (M.D. Ala. Mar. 22, 2010) (finding no
21 constitutional infirmity in disciplining a chiropractor for telling a patient to throw away medicine
22 prescribed by a physician, in light of fact that chiropractors could not prescribe).

23 Plaintiffs point to the case of *Legal Services Corporation v. Velazquez*, 531 U.S.
24 533 (2001). But in that case, the Supreme Court rejected regulations that restricted legal services
25 lawyers from advising their clients and advocating that welfare laws were unconstitutional
26 because the government had not reasonably controlled the message in the limited public forum it

1 had created by subsidizing the legal services. *Id.* at 543-44. The instant case does not involve
2 speech in a limited public forum.

3 This case instead is more like *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447
4 (1978), in which the Court rejected a lawyer’s challenge to professional discipline for his in-
5 person solicitation of clients. In so doing it observed that a lawyer’s solicitation is only
6 marginally related to First Amendment concerns and so falls within the state’s “proper sphere of
7 economic and professional regulation,” particularly in light of the state’s “special responsibility”
8 for maintaining standards among members of the licensed professions. *Id.* at 459, 460.

9 As SOCE therapy is subject to the state’s legitimate control over the professions,
10 SB 1172's restrictions on therapy do not implicate fundamental rights and are not properly
11 evaluated under strict scrutiny review, but rather under the rational basis test. *NAAP*, 228 F.3d at
12 1050 (applying rational basis test after deciding that challenged mental health professional
13 licensing scheme did not implicate a fundamental right). Applying the rational basis test, the
14 reviewing court presumes the constitutionality of the state action by requiring those challenging
15 the legislative judgment to “convince the court that the legislative facts on which the
16 classification is apparently based could not reasonably be conceived to be true by the
17 governmental decisionmaker.” *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The
18 state action need not even actually advance its stated purpose; the court instead inquires whether
19 “the government could have had a legitimate reason for acting as it did.” *Id.* (internal quotations
20 and citation omitted). As examined below, SB 1172 passes the rational basis test. *See* pages 42-
21 22 *infra*. Plaintiff therapists are not likely to prevail on the merits on their First Amendment
22 claim.

23 2. Minors’ Free Speech Rights and Prevention of Receipt of Information
24 about SOCE

25 Plaintiffs argue that SB 1172 violates minors’ First Amendment rights by
26 preventing them from being able to receive or hear about SOCE. (ECF 28 at 28-29.) The

1 government may burden children’s right to free speech under the First Amendment, but “only in
2 relatively narrow and well-defined circumstances.” *Erznoznik v. City of Jacksonville*, 422 U.S.
3 205, 212-13 (1975). “The state’s authority over children’s activities is broader than over like
4 actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-
5 rounded growth of young people into full maturity as citizens, with all that implies.” *Prince v.*
6 *Massachusetts*, 321 U.S. 158, 168 (1944). The government’s interest in the well-being of
7 children exists apart from the government’s interest in supporting parents’ efforts to protect their
8 children. *See Ginsberg v. State of New York*, 390 U.S. 629, 640 (1968). Thus, the Supreme
9 Court “ha[s] sustained legislation aimed at protecting the physical and emotional well-being of
10 youth even when the laws have operated in the sensitive area of constitutionally protected
11 rights.” *New York v. Ferber*, 458 U.S. 747, 757 (1982).

12 The First Amendment protects listeners’ right to receive information. *Bd. of*
13 *Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982); *Stanley*
14 *v. Georgia*, 394 U.S. 557, 564 (1969). Communication between doctors and patients can
15 implicate patients’ rights to free speech. *See Conant*, 309 F.3d at 636. The court has already
16 concluded that SB 1172’s restrictions on SOCE do not implicate the First Amendment right to
17 free speech in analyzing plaintiff therapists’ claim. The minors’ claim is but the “flip side of that
18 coin,” *id.* at 643 (Kozinski, J., concurring), and subject to a similar, more exacting analysis, *see*
19 *Pico*, 457 U.S. at 867. Plaintiffs have not shown a likelihood of success on the minor plaintiffs’
20 claim.¹²

21 3. Vagueness

22 Plaintiffs make three primary vagueness arguments as part of their First
23 Amendment due process challenge: First, plaintiffs maintain “SB 1172 leaves the therapist
24

25 ¹² The court is sympathetic to the fact that minor plaintiffs’ courses of therapy will be
26 disrupted once SB 1172 goes into effect. However, in the applicable legal framework, this
concern is relevant to the question of irreparable harm, which the court does not reach here, as
opposed to the merits of the minors’ claims.

1 guessing since it does not define . . . the foundational concept of ‘sexual orientation.’” (ECF 28
2 at 14.) Second, plaintiffs maintain “SB 1172 also fails to address . . . what counsel therapists
3 may provide to minors who identify themselves as bisexual.” (*Id.* at 16.) Finally, plaintiffs
4 argue, “the lack of any specified geographic boundaries further obscures the reach of the bill”
5 because “SB 1172 could presumably cover [w]eb videos, radio broadcasts or electronic
6 transmissions *into* California that provide SOCE or referrals to counselors who provide SOCE.”
7 (*Id.* at 17; emphasis in original.)¹³

8 Due process demands that any statutory proscription be sufficiently precise “to
9 provide people of ordinary intelligence a reasonable opportunity to understand what conduct it
10 prohibits.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also Grayned v. City of Rockford*,
11 408 U.S. 104, 108 (1972). A statute lacking the requisite precision must be struck down for
12 vagueness. *Id.*

13 However, “perfect clarity and precise guidance have never been required even of
14 regulations that restrict expressive activity.” *Ward v. Rock Against Racism*, 491 U.S. 781, 794
15 (1989) (citing *Grayned*, 408 U.S. at 110.) Indeed, voiding a democratically enacted statute on
16 grounds it is unduly vague is an extreme remedy. The Ninth Circuit has explained that facial
17 invalidation for vagueness “is, manifestly, strong medicine that has been employed by the
18 [Supreme] Court sparingly and only as a last resort.” *California Teachers Ass'n v. State Bd. of*
19 *Educ.*, 271 F.3d 1141, 1155 (9th Cir. 2001). When addressing a facial vagueness challenge, as
20 here, the court “should uphold the challenge only if the enactment is impermissibly vague in all
21 of its applications.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,
22 494-95 (1982); *accord Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133, 1146

23
24 ¹³ Plaintiffs also argue that the statute acts as an unconstitutional prior restraint on
25 expression. The court already has found that SB 1172 does not proscribe expression, but rather
26 conduct. Plaintiffs also contend SB 1172 improperly vests unbridled discretion in a public
official. Plaintiffs’ argument in this regard is unavailing because, as described below, the statute
is sufficiently clear such that no public official is given limitless discretion. Plaintiffs have not
shown a likelihood of success on the merits based on these theories.

1 (2009) (a statute will survive a facial vagueness challenge so long as “it is clear what the statute
2 proscribes in the vast majority of its intended applications”); *Cal. Teachers Ass’n*, 271 F.3d at
3 1151 (“[U]ncertainty at a statute’s margins will not warrant facial invalidation if it is clear what
4 the statute proscribes in the vast majority of its intended applications.”).

5 An additional analytical nuance exists where the statutory proscription purports to
6 regulate a targeted industry or profession. That is,

7 if the statutory prohibition involves conduct of a select group of
8 persons having specialized knowledge, and the challenged
9 phraseology is indigenous to the idiom of that class, the standard is
10 lowered and a court may uphold a statute which uses words or phrases
having a technical or other special meaning, well enough known to
enable those within its reach to correctly apply them.

11 *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir.1993) (quoting *Precious Metals*
12 *Assocs., Inc. v. Commodity Futures Trading Comm’n*, 620 F.2d 900, 907 (1st Cir. 1980), in turn
13 quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); internal quotations
14 omitted).

15 a. “Sexual Orientation”

16 Plaintiffs’ argument attacking the term “sexual orientation” as undefined, as well
17 as the corresponding lack of guidance to a therapist regarding when or if he or she has begun to
18 engage in prohibited SOCE therapy, cites the APA Task Force, which noted that “[s]ame-sex
19 sexual attractions and behavior occur in the context of a variety of sexual orientations . . . and . . .
20 is fluid or has an indefinite outcome.” (ECF 28 at 14.) In response, defendants argue that
21 plaintiffs, as practitioners of SOCE, cannot allege the term “sexual orientation” is vague;
22 moreover, they say, the term “sexual orientation” is well understood within the mental health
23 field generally. “To practicing psychologists, it is a term of ‘common understanding . . . to
24 which no [practitioner] is a stranger.” (*Id.* at 19.) Defendants also argue the statute proscribes
25 only the discrete act of attempting, through sexual orientation change efforts, to alter the sexual
26 orientation of a minor. (*Id.* at 20.)

1 SB 1172 does proscribe that which the named plaintiff therapists themselves
 2 admit to practicing and therefore must understand: therapy the sole purpose of which is to alter
 3 the sexual orientation of a patient, namely SOCE.¹⁴ The court is unpersuaded that the term
 4 “sexual orientation” is unduly vague. Plaintiffs rely on *Keyishian v. Board of Regents of*
 5 *University of State of N. Y.*, 385 U.S. 589, 599 (1967), which held that a statute prohibiting
 6 employing any teacher who “advocates, advises, or teaches the doctrine of forceful overthrow of
 7 the government” was unconstitutionally vague because “[i]t w[ould] prohibit the employment of
 8 one who merely advocates the doctrine in the abstract without any attempt to indoctrinate
 9 others.” *Id.* For example, the Court inquired whether “the teacher who carries a copy of the
 10 Communist Manifesto on a public street” violates the statute. *Id.* *Keyishian* is not analogous to
 11 this case: the term “sexual orientation” does not create uncertainty as to what a therapist can and
 12 cannot do, as was the case for teachers in *Keyishian*; rather it is what the statute proscribes.¹⁵
 13 Unlike in *Keyishian*, the statute expressly targets a specific form of therapy known to the
 14 community in which it is practiced.

15 The court also finds the term “sexual orientation” is neither linguistically nor
 16 semantically vague. The definition of the term is clear: “[A] person’s sexual identity in relation
 17 to the gender to whom he or she is usually attracted; [] the fact of being heterosexual, bisexual,
 18 or homosexual.” CONCISE OXFORD ENGLISH DICTIONARY 1321 (12th ed. 2011). This definition
 19 _____

20 ¹⁴ As noted at the hearing, some plaintiffs are organizations with nearly 50,000 members,
 21 such as AACC. (See ECF 1 ¶ 26.) This fact does not change the analysis. The declarations
 22 submitted by representatives of NARTH and AACC show those organizations are dedicated to
 23 “eliminat[ing] [a person's] unwanted same-sex attractions and the psychological factors that are
 24 typically associated with a homosexual lifestyle.” (Pruden Decl., ECF 28-3 ¶ 4; *see also*
 25 *generally* Scalise Decl., ECF 28-4.) The court is not persuaded that persons who have chosen to
 26 join the plaintiff organizations may not be able to comprehend SB 1172’s definition of SOCE as
 “practices . . . that seek to change an individual’s sexual orientation.”

¹⁵ Defendants’ reliance on *Holder v. Humanitarian Law Project*, ___ U.S. ___, 130 S.Ct.
 2705 (2010) for the proposition that the therapist plaintiffs cannot demonstrate a likelihood of
 success on the merits because they “engage[] in conduct that is ‘clearly proscribed’ by the
 statute” is unpersuasive. (ECF 48 at 17:11-13.) *Holder* involved an “as applied” challenge,
 whereas plaintiffs here attack SB 1172 facially. *Holder*, 130 S.Ct. at 2712.

1 is reinforced by a litany of California statutes. *See, e.g.*, CAL. EDUC. CODE § 212.6 (defining
 2 sexual orientation as “heterosexuality, homosexuality, or bisexuality”); CAL. CIV. CODE
 3 § 51(e)(6) (referencing CAL. GOV’T CODE § 12926®)¹⁶ (same); CAL. PENAL CODE § 422.56(h)
 4 (same).¹⁷

5 One other federal court, after canvassing other decisions, determined the term
 6 sexual orientation is not unconstitutionally vague. *See Hyman v. City of Louisville*, 132 F. Supp.
 7 2d 528, 545-47 (W.D. Ky. 2001) (relying on Black’s dictionary definition, rejecting vagueness
 8 challenge to statute banning discrimination on the basis of sexual orientation), *rev’d on other*
 9 *grounds*, 53 Fed. Appx. 740 (6th Cir. 2002). That court concluded, “[t]he definitions of ‘sexual
 10 orientation’ . . . are consistent with the meanings attributed to those terms by common usage,”
 11 namely heterosexuality, homosexuality, and bisexuality. *Id.*

12 Because plaintiffs use the term themselves to describe the sexual orientation
 13 change therapy they practice, the standard of review is lower. The “statutory prohibition
 14 involves conduct of a select group of persons having specialized knowledge, and the challenged
 15 phraseology is indigenous to the idiom of that class” *Weitzenhoff*, 35 F.3d at 1289.
 16 Plaintiff therapists “well enough know” what the statute proscribes. *Id.*

17 b. Treatment Allowed and Disallowed

18 In complaining that SB 1172 fails to clarify the forms of therapy covered by the
 19 statute, plaintiffs point out the new law does not address what therapists may do when visited by
 20 minors who identify themselves as bisexual. They argue “there is simply no way to determine a
 21 proper course of action when a [bisexual] questioning person enters [a therapist’s] office.” (ECF
 22

23 ¹⁶ The California Legislature amended this Government Code section in 2012. *See* 2012
 24 Cal. Legis. Serv. Ch. 287 (A.B. 1964) (WEST); 2012 Cal. Legis. Serv. Ch. 448 (A.B. 2370)
 25 (WEST); 2012 Cal. Legis. Serv. Ch. 457 (S.B. 1381) (WEST); 2012 Cal. Legis. Serv. Ch. 701
 26 (A.B. 2386) (WEST). These amendments, however, did not alter the statute’s definition of
 sexual orientation.

¹⁷ The common definition of the term sexual orientation does not, as plaintiffs’ counsel
 suggested at hearing, include “pederasty.”

1 28 at 17.) In its amicus brief, EQCA notes the statute defines the term “sexual orientation
2 change efforts” as “any practices by mental health providers that seek to change an individual’s
3 sexual orientation,” such as efforts to “change behaviors or gender expressions, or to eliminate or
4 reduce sexual or romantic attractions or feelings toward individuals of the same sex.” (Amicus
5 at 14, ECF 70.) The statute also lists a number of psychotherapeutic techniques that do not fall
6 within the statutory proscription. (*Id.*) Defendants point out the statute “does not prohibit
7 mental health providers from counseling parties that homosexuality is morally wrong and should
8 be changed, so long as they do not engage a minor in a course of treatment designed to change
9 their sexual orientation.” (ECF 48 at 20.) Such a course of treatment “requires a concerted
10 application of psychological techniques and principles” in order to “chang[e] deeply rooted
11 feelings and behaviors.” (*Id.*)

12 While the statute does not go into the level of detail plaintiffs suggest is needed,
13 on its face the new law is clear enough: mental health providers, as defined by the statute, may
14 not implement practices designed for the specific purpose of changing an individual’s sexual
15 orientation. The record is replete with specific explanations and examples of what SOCE can
16 entail, including from plaintiffs themselves.¹⁸ As explained above, such practices include both
17 aversive and non-aversive techniques: inducing nausea, vomiting, or paralysis; providing
18 electric shocks; or having the individual snap an elastic band around the wrist when aroused by
19 same-sex erotic images or thoughts, as well as attempting to alter thought patterns by reframing
20 desires, redirecting thoughts, or using hypnosis. It is these forms of therapy, implemented with
21 the intent to alter the patient’s sexual orientation, that the statute prohibits.

22
23 ¹⁸ The declaration submitted by plaintiff therapist Dr. Nicolosi expressly describes the
24 types of therapeutic techniques SOCE practitioners employ in their efforts to alter a patient’s
25 sexual orientation. (*See* Nicolosi Decl. ¶ 9) (discussing what his “SOCE counseling consists of
26 . . .”). The declarations submitted by plaintiff therapists also demonstrate that they provide their
minor patients with detailed informed consent of the nature of SOCE therapy. (*See id.* ¶ 6
 (“Prior to engaging in SOCE Counseling with patients, I provide them an extensive consent form
that outlines the nature of the treatment.”)); *see also* Rosik Decl. ¶ 9 (explaining that he provides
patients “advanced informed consent,” which “explains his therapeutic approach.”)).

1 The simplicity of the statute also cuts against plaintiffs' argument. At bottom, the
2 proscription is discernable to a reasonable person, and particularly to a mental health
3 professional: any psychotherapeutic intent to change sexual orientation is not allowed by any
4 licensed professional. *Cf. United States v. Kuffel*, 1 F.3d 1247 (9th Cir. 1993) (denying
5 vagueness challenge to sentencing statute, in part, because of the "simple wording of th[e]
6 statute."). Nothing in SB 1172 prevents a therapist from mentioning the existence of SOCE,
7 recommending a book on SOCE or recommending SOCE treatment by another unlicensed
8 person such as a religious figure.¹⁹ (ECF 28 at 16.) The statute does not require affirmation of a
9 patient's homosexuality. *Id.* Even if, "at the margins," there is some conjectural uncertainty as
10 to what the statute proscribes, such uncertainty is insufficient to void the statute for vagueness
11 because "it is clear what the statute proscribes in the vast majority of its intended applications,"
12 *Cal. Teachers Ass'n*, 271 F.3d at 1151, namely therapy intended to alter a patient's sexual
13 orientation.

14 c. Geographic Reach

15 Plaintiffs' argument based on the lack of geographic boundaries notes that SB
16 1172 could cover a California-licensed counselor who also is licensed in other jurisdictions and
17 who offers SOCE in states outside of California. (*Id.* at 18.) Defendants respond that the statute
18 "does not prohibit, on its face or otherwise, web videos, radio broadcasts, or electronic
19 transmissions into California about SOCE." (*Id.* at 20.)

20 Here, the statute does not subject a licensed mental health professional to
21 discipline for merely sending "[w]eb videos, radio broadcasts or electronic transmission[s] into
22 California." (ECF 28 at 17.) If a mental health professional licensed by California is engaging a
23

24 ¹⁹ Dr. Nicolosi has described SOCE therapy as a "long-term process, and one that is in
25 fact most probably lifelong." (JOSEPH NICOLOSI, PH.D., REPARATIVE THERAPY OF MALE
26 HOMOSEXUALITY, 165-168 (1997), attached as Exhibit 2 to the Stein Declaration, ECF 54). The
mere mention of SOCE's existence is inconsistent with the extensive and long-term efforts
plaintiffs indicate are necessary to effectuate SOCE.

1 patient in therapy intended to alter that patient's sexual orientation via video conference, or other
2 remote medium, only then is that therapist subject to discipline.

3 In sum, based on the record before the court, there is a general understanding of
4 what SOCE encompasses and the statute surpasses the bar set for minimal clarity. Plaintiffs are
5 not likely to succeed on the merits of their claim that SB 1172 is unconstitutionally vague.

6 4. Parents' Fundamental Rights

7 Plaintiffs assert that the parental right at issue in this case, of choosing a particular
8 mental health therapy for one's children, is a fundamental right that California cannot infringe
9 without satisfying strict scrutiny. (ECF 28 at 22 (citing *Troxel v. Granville*, 530 U.S. 57, 80
10 (2000) (Thomas, J. concurring)).) Plaintiffs contend SB 1172 "tramples" upon parents'
11 fundamental interest in the care, custody, and control of children by preventing parents from
12 caring for their children's mental health as the parents see fit.²⁰ (*Id.* at 18.) Analogizing to
13 *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510,
14 534-35 (1925), plaintiffs aver SB 1172 operates in the same unconstitutional manner as the state-
15 imposed educational programs in those cases, which prevented parents from choosing German
16 language instruction and private school education for their children. Plaintiffs say SB 1172 in
17 the same way prevents parents from choosing SOCE therapy for their children. (ECF 28 at 20-
18 22.)

19 Plaintiffs further contend parents' right to make decisions regarding their
20 children's mental health is specifically protected, even when that decision is not agreeable to the
21 child or involves risks. (*Id.* at 19 (citing *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979)).) Neither
22 state officials nor federal courts, plaintiffs maintain, are equipped to review such parental
23

24 ²⁰ Plaintiffs define the parental right at issue as choosing mental health treatment for
25 one's children. (ECF 28 at 18, 22). In their moving papers, plaintiffs do not attempt to argue
26 parental rights based upon freedom of religion, although free exercise arguments are contained in
their fourth and fifth claims for relief. (ECF 1 at 43-45.) Therefore, the court does not address
the Free Exercise Clause in deciding this motion.

1 decisions. (*Id.* (citing *Parham*, 442 U.S. at 603-04).) Finally, plaintiffs claim defendants have
2 no proof that SOCE therapy is harmful, but rather rely upon “mere[] policy statements by
3 organizations politically opposed to SOCE therapy” that are “anecdotal [and] speculative.”
4 (ECF 28 at 22; ECF 60 at 11.) Because SOCE therapy is harmless, children are not protected by
5 proscribing it; therefore, plaintiffs conclude, California has no compelling interest in SB 1172
6 that justifies its encroachment on fundamental parental rights. (ECF 60 at 11.)

7 Defendants argue SB 1172 does not infringe any fundamental rights and should
8 be upheld because it is “rationally related to a legitimate state interest.” (ECF 48 at 24 (citing
9 *NAAP*, 228 F.3d at 1047).) Defendants contend there is no fundamental or privacy right in
10 choosing a particular type of medical treatment, whether on behalf of oneself or one’s children.
11 (*Id.* at 21.) Defendants cite Ninth and Tenth Circuit cases in which the courts held cancer
12 patients did not have a privacy interest in choosing a treatment the FDA had not deemed safe and
13 effective. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (per curiam);
14 *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980).

15 Parents do of course have a fundamental interest in the general care, custody, and
16 control of their children. *Troxel*, 530 U.S. at 65; *Wisconsin v. Yoder*, 406 U.S. 205, 213-14
17 (1972); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 400-01. This interest is “perhaps the
18 oldest of the fundamental liberty interests” recognized by the Supreme Court. *Troxel*, 530 U.S.
19 at 65. State action that infringes upon this fundamental right is subject to strict scrutiny. *Fields*
20 *v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), *aff’d*, 447 F.3d 1187 (2006) (per
21 curiam), *cert. denied*, 549 U.S. 1089 (2006) ; *see also Yoder*, 406 U.S. at 221 (“Where
22 fundamental claims of religious freedom are at stake . . . we must searchingly examine the
23 interests that the State seeks to promote . . .”). In addition, the Supreme Court has found there
24 is a “traditional presumption that a fit parent will act in the best interest of his or her child.”
25 *Troxel*, 530 U.S. at 69 (citing *Parham*, 442 U.S. at 602).

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1 This fundamental parental interest is not without limitation, however. *Prince*, 321
2 U.S. at 166; *Fields*, 427 F.3d at 1204. “[T]he state has a wide range of power for limiting
3 parental freedom and authority in things affecting the child’s welfare; and [] this includes, to
4 some extent, matters of conscience and religious conviction.” *Prince*, 321 U.S. at 167. State
5 action that does not affect a fundamental right is reviewed under the rational basis test. *Fields*,
6 427 F.3d at 1208. State actions that have prevailed over conflicting parental rights in the face of
7 rational basis review include requiring school attendance, regulating or prohibiting child labor,
8 and compelling school vaccinations. *Prince*, 321 U.S. at 166. Moreover, the Supreme Court has
9 declared states have a compelling interest in “safeguarding the physical and psychological well-
10 being of a minor.” *New York v. Ferber*, 458 U.S. 747, 756 (1982) (internal quotations and
11 citation omitted). In short, limitations to parental rights may exist where “harm to the physical
12 or mental health of the child or to the public safety, peace, order, or welfare has been
13 demonstrated or may be properly inferred.” *Yoder*, 406 U.S. at 230; *see also Runyon v.*
14 *McCrary*, 427 U.S. 160, 177 (1976) (no fundamental parental right to educate children in private
15 segregated schools); *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (upholding a
16 compulsory inoculation statute); *Fields*, 427 F.3d at 1206 (parental rights do not encompass the
17 right to direct how a public school teaches children, even when the curriculum includes graphic
18 sexual content); *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1041-42 (9th Cir. 2000)
19 (parental rights did not encompass the right to have state-funded speech therapy for home-
20 schooled children); *Carnohan*, 616 F.2d at 1122) (no fundamental right to access drugs the FDA
21 has not deemed safe and effective); *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (D.C. Cir.
22 1999) (upholding a municipality’s curfew for minors).

23 Here, as discussed below, the court finds there is no fundamental or privacy right
24 to choose a specific mental health treatment the state has reasonably deemed harmful to minors.
25 No such right follows from the line of cases beginning with *Meyer*, nor is it specifically
26 enumerated in other substantive due process cases.

1 a. Definition of Right

2 The Supreme Court instructs that substantive due process analysis “must begin
3 with a careful description of the asserted right[,] for the more general is the right's description,
4 *i.e.*, the free movement of people, the easier is the extension of substantive due process.”
5 *Hutchins*, 188 F.3d at 538 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *see also Michael H.*
6 *v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., for the court but joined in footnote only
7 by Rehnquist, C.J.) (proper level of generality at which to describe the right is “the most specific
8 level at which a relevant tradition protecting, or denying protection to, the asserted right can be
9 identified”). “And the ‘doctrine of judicial self-restraint requires us to exercise the utmost care
10 whenever we are asked to break new ground in this field.’” *Hutchins*, 188 F.3d at 538 (quoting
11 *Flores*, 507 U.S. at 302).

12 Here, plaintiffs frame the contested right as encompassing: parents’ interest in
13 the care, custody, and control of their children; parents’ right to care for the mental health of
14 their children as the parents see fit; and parents’ right to choose a specific form of counseling for
15 their children. (ECF 28 at 18, 21.) Defendants, in contrast, frame the contested right as the
16 privacy interest or fundamental right in choosing a particular type of medical treatment or
17 medical provider, either on one’s own or one’s children’s behalf. (ECF 48 at 21.)

18 The court defines the right at issue in this case as the right to choose a specific
19 mental health treatment that the state has deemed harmful to minors. This definition is
20 consistent with plaintiffs’ description of the contested right in similar terms. (*See* ECF 28 at 18,
21 21.) It also is the most specific level at which the court has been able to identify precedent
22 addressing the protection accorded analogous asserted rights. *Cf. Fields*, 427 F.3d at 1206
23 (parental rights do not encompass the right to direct how a public school teaches children, even
24 when the curriculum includes graphic sexual content); *Carnohan*, 616 F.2d at 1122 (no
25 fundamental interest in choosing a drug the FDA has not found safe or effective).

26 ////

1 Although parental rights and other substantive due process rights, such as privacy,
2 have traditionally been developed through distinct frameworks, the Supreme Court has intimated
3 the two types of right may be “no more than verbal variations of a single constitutional right.”
4 *Runyon v. McCrary*, 427 U.S. 160, 178 n.15 (1976) (citing *Roe v. Wade*, 410 U.S. 113, 152-53
5 (1973)). Nevertheless, the *Runyon* Court addressed parental and privacy rights separately. This
6 court follows the *Runyon* Court’s blueprint and examines each type of right in turn.

7 b. Parental Rights

8 i. *Meyer* Line of Cases

9 The line of cases beginning with *Meyer* “evinces the principle that the state
10 cannot prevent parents from choosing a specific educational program . . . that is, the state does
11 not have the power to ‘standardize its children’ or ‘foster a homogenous people.’” *Fields*, 427
12 F.3d at 1205 (quoting *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir.
13 1995), *abrogated on other grounds by Martinez v. Cui*, 608 F.3d 54, 63-64 (1st Cir. 2010)).
14 *Meyer* and its progeny are distinguishable from the instant case in three important ways. First,
15 the contested state actions in the *Meyer* cases constituted comprehensive and total interference
16 with a parental right. Thus, the Court broadly defined the fundamental right at issue in each case
17 as parents’ interest in the care, custody, and control of their children. Second, as the Court in
18 *Yoder* noted, none of the *Meyer* cases dealt with an instance in which “any harm to the physical
19 or mental health of the child or to the public safety, peace, order, or welfare has been
20 demonstrated or may be properly inferred.” *Yoder*, 406 U.S. at 230. Third, plaintiffs in the
21 *Meyer* cases, with the exception of *Pierce*, brought as-applied challenges after being criminally
22 convicted of violating the challenged statutes (*Meyers* and *Yoder*) or after being negatively
23 affected by the implemented statute (*Troxel*). Such as-applied challenges require plaintiffs to
24 meet a lower burden to demonstrate unconstitutionality than does the facial challenge mounted
25 here. *See Patel v. City of Los Angeles*, 686 F.3d 1085, 1086 (9th Cir. 2012) (facial challenge is
26 “the most difficult challenge to mount successfully, since the challenger must establish that no

1 set of circumstances exist under which the Act would be valid”) (quoting *United States v.*
2 *Salerno*, 481 U.S. 739, 745 (1987)).

3 In *Meyer*, the Nebraska statute at issue prohibited any person, “individually or as
4 a teacher,” from teaching modern foreign languages in any “private, denominational, parochial,
5 or public school” to children below the Eighth Grade. 262 U.S. at 396. The Court scrutinized
6 the statute under something akin to the rational basis test, concluding the statute was “arbitrary
7 and without reasonable relation to any end within the competency of the state.” *Id.* at 403. The
8 statute also prescribed criminal punishment for violators; the plaintiff had already been tried and
9 convicted. *Id.* at 396. In effect, the statute enacted a total ban on the teaching of modern
10 languages to children below the Eighth Grade, as it prohibited any person, not just state-licensed
11 or professional teachers, from teaching in these languages, even in religious schools. The Court
12 also found no evidence that such language instruction would harm children; the laudable goal of
13 encouraging civic participation through monolingualism was insufficient justification. *Id.* at
14 403.

15 In contrast, SB 1172 bars parents only from seeking SOCE through state-licensed
16 mental health professionals. SB 1172 § 2(865)(a) (restricting prohibition to state-licensed
17 “mental health providers”). It does not enact a comprehensive and total ban; parents can still
18 seek SOCE or its equivalent through religious institutions or other unlicensed providers. SB
19 1172 also does not impose criminal punishment. And the California Legislature relied upon the
20 expertise of ten different mental health professional organizations who have discouraged or
21 opposed SOCE as a “cure” for homosexuality, SB 1172 § 1(a)-(l), some of which deem SOCE a
22 violation of ethical principles. SB 1172 § 1(l) (noting statement of Pan American Health
23 Organization). The Legislature also relied on studies indicating minors who face family
24 rejection based on their sexual orientation face especially serious health risks. SB 1172 § 1(m).
25 No such indication of harm was before the Court in *Meyer*. See 262 U.S. at 403.

26 ////

1 *Pierce* is even more readily distinguishable from this case. There, an Oregon
2 statute required every eight- to sixteen-year-old child to attend public school, 268 U.S. at 530,
3 effectively foreclosing all other education options, including private religious schooling and
4 home schooling. The Court determined the prohibited activity in which the plaintiff educational
5 corporations engaged, private and religious primary education, was not inherently harmful to
6 children, but rather was “long regarded as useful and meritorious.” *Id.* at 534. In contrast, SB
7 1172 does not foreclose all parents’ options to seek SOCE. On the record before it, the court is
8 not prepared to second-guess the Legislature’s determination that SOCE therapy cannot at this
9 point be considered “long regarded as useful and meritorious.”

10 *Yoder*, in which Amish parents successfully contested a Wisconsin statute
11 requiring formal public or private school attendance until age sixteen, is similarly
12 distinguishable. 406 U.S. at 207. Plaintiffs in that case relied largely upon the Free Exercise
13 Clause, a claim plaintiffs do not rely on in this motion. *See id.* at 213. The *Yoder* plaintiffs
14 contended it was fundamental to the Amish faith that their children not be educated outside the
15 Amish community, and the Amish Community did not provide formal schooling that satisfied
16 the statute. *Id.* The Wisconsin statute acted as a comprehensive and total bar to plaintiffs’
17 religious practices, and plaintiffs had been criminally charged, tried, and convicted of violating
18 the statute by refusing to send their children to school. *Id.* at 208. The Court in *Yoder* found no
19 evidence the Wisconsin statute prevented harm. *Id.* at 230-32. Here, in contrast, SB 1172 does
20 not impede parents’ religious or moral convictions because it proscribes SOCE only as
21 performed by state-licensed mental health professionals, and the California Legislature relied on
22 more than hypothetical information.

23 Plaintiffs also rely on the parental rights case of *Troxel*. There, the Court
24 invalidated a Washington statute that interfered with parents’ decisions on visitation rights. 530
25 U.S. at 67. The statute was “breathhtakingly broad”: the Court found it effectively allowed a state
26 court to “disregard and overturn *any* decision by a fit custodial parent concerning visitation

1 whenever a third party affected by the decision file[d] a visitation petition, based solely on the
2 judge's determination of the child's best interests.” *Id.* (emphasis in original). When the plaintiff
3 in *Troxel* brought her challenge, Washington had already implemented the statute, and the
4 plaintiff’s children’s grandparents had been awarded visitation rights over her objection. *Id.* at
5 62. The serious nature of the parental right at issue in *Troxel*, coupled with the unbounded
6 judicial discretion vested by the “best interests” standard, distinguish the statute in *Troxel* from
7 SB 1172. Preventing state-licensed mental health professionals from providing SOCE to minors
8 is not equivalent to empowering state officers to override parents’ decisions on who should be
9 allowed have to familial visits with their children. Also in *Troxel*, the visitation statute required
10 no showing of harm, and the state of Washington made no showing to counter the plaintiff’s as-
11 applied challenge. *Id.* at 68.

12 ii. *Prince and Fields*

13 *Prince*, in which the Supreme Court identified limitations to the parental right at
14 issue in *Meyer*, is more similar to the instant case than any of the *Meyer* cases. In *Prince*, the
15 Court upheld a Massachusetts statute prohibiting twelve to eighteen year olds from selling
16 magazines, newspapers, and periodicals on city streets or in any public place. *Prince*, 321 U.S.
17 at 160-61. Whoever furnished such items to minors could be criminally sanctioned. *Id.* at 161.
18 The plaintiff was cited under this statute when she took her minor niece with her to preach about
19 their Jehovah’s Witness faith and to sell related magazines on a public street. *Id.* at 161-63. The
20 plaintiff argued the Massachusetts statute was unconstitutional because it did not target activity
21 that poses a “clear and present danger” to a child; the child was in no danger when she was
22 simply preaching the Gospel and selling church magazines on a public street in the company of
23 her legal guardian. *Id.* at 167.

24 The Court in *Prince* upheld the statute as applied, noting the state’s greater
25 authority over children’s activities than adults’. *Id.* at 168. While recognizing the fundamental
26 right of parents to the care, custody, and control of their children as determined in *Pierce*, the

1 Court found that the “family itself is not beyond regulation in the public interest.” *Id.* at 166-67.
2 It observed that a democratic state depends on children developing into healthy maturity as
3 citizens, and states can secure this goal “against impeding restraints and dangers, within a broad
4 range of selection.” *Id.* Child labor, the Court found, is crippling, and time on the streets carries
5 with it many “possible harms.” *Id.* Even if a child is not engaged in child labor per se, but is
6 evangelizing in the company of a parent, harmful possibilities still attach, such as “emotional
7 excitement and psychological or physical injury.” *Id.* at 170. Parents may choose to martyr
8 themselves, but they may not “make martyrs of their children before they have reached the age
9 of full and legal discretion when they can make that choice for themselves.” *Id.*

10 As did the state of Massachusetts in *Prince*, California here has determined to
11 protect minors from particular conduct in the interest of preventing possible harm. Parents’
12 interest in choosing a mental health therapy for their children is not beyond state regulation; if
13 the state determines a therapy is potentially harmful to minors, it may prohibit minors from
14 receiving that therapy from state-licensed therapists. *Cf. id.* at 166-67. In other words, parents
15 may not conscript the state-regulated mental health profession into treating their children with a
16 potentially harmful therapy before those children have reached the age of majority. *Cf. id.* at
17 168-70.

18 The differences between *Prince* and this case serve only to strengthen the
19 conclusion that this case should be decided as *Prince* was. First, SB 1172 is a more limited
20 regulation than that in *Prince*, in that it is not an “absolute prohibition” of the regulated conduct.
21 *See id.* at 168. Minors can still receive SOCE treatment from non-licensed providers. Second,
22 SB 1172 does not impose criminal penalties; instead, mental health professionals who violate the
23 statute are subject to professional disciplinary action. Third, the plaintiff in *Prince* faced a lower
24 threshold in proving the statute unconstitutional because she brought an as-applied challenge, *id.*
25 at 159, whereas here plaintiffs bring a facial challenge. *See Patel*, 686 F.3d at 1086.

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1 Additionally, the Ninth Circuit, in company with the First and Sixth Circuits, has
2 held that parental rights do not encompass the analogous right to direct how a public school
3 teaches children, even when the curriculum includes graphic sexual content. *Fields*, 427 F.3d at
4 1206; *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (parents do not
5 have a fundamental right to direct how a public school teaches their children); *Brown*, 68 F.3d at
6 529 (“We think it is fundamentally different for the state to say to a parent, ‘You can’t teach your
7 child German or send him to a parochial school,’ than for the parent to say to the state, ‘You
8 can’t teach my child subjects that are morally offensive to me.’”).

9 In *Fields*, parents contended a survey the school administered to their children
10 violated parents’ fundamental rights because the survey contained sexually-explicit questions.
11 427 F.3d at 1200. The school administered the survey to discover whether some children
12 suffered psychological impediments to learning. *Id.* Parents argued they had a fundamental
13 right to introduce their children to sexual matters as they saw fit. *Id.* The court rejected this
14 argument, holding that parents have the “right to inform their children when and as they wish on
15 the subject of sex; they have no constitutional right, however, to prevent a public school from
16 providing its students with whatever information it wishes to provide, sexual or otherwise, when
17 and as the school determines that it is appropriate to do so.” *Id.* at 1206. Parents did not have
18 the right to compel public schools to follow their “idiosyncratic views” about what information
19 schools can dispense. *Id.* “While parents may have a fundamental right to decide *whether* to
20 send their child to a public school, they do not have a fundamental right generally to direct *how* a
21 public school teaches their child.” *Id.* (quoting *Blau*, 401 F.3d at 395-96; emphases in original).

22 The analogy to *Fields* in this case is strong. Parents have the right to teach their
23 children whatever they wish regarding sexual orientation, and retain the right to obtain SOCE
24 from unlicensed providers, including religious figures. Parents do not, however, have the right
25 to prevent a state from proscribing the practice of a particular therapy when the state reasonably
26 determines such proscription is appropriate. In the face of California’s legislative determination

1 that homosexuality is not an illness to be treated with SOCE, based upon identified medical and
2 scientific information, some parents' desire to obtain SOCE from licensed professionals is
3 equivalent to parents seeking to compel schools to deliver messages conforming to parents' own
4 moral views. While parents have a fundamental right to decide whether to avail themselves of
5 state-regulated mental health professionals, they do not have a fundamental right to direct the
6 state's regulation of those professionals. *Cf. Blau*, 401 F.3d at 395-96.

7 The court in *Fields* also considered the practicalities of expanding parents'
8 fundamental rights to include the right to prevent public schools from delivering information
9 some parents find morally objectionable. 427 F.3d at 1207. The court could find no
10 constitutional reason to distinguish the concern in *Fields* from "any of the countless moral,
11 religious, or philosophical objections that parents might have to other decisions of the School
12 District — whether those objections regard information concerning guns, violence, the military,
13 gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-
14 validated theories of the origins of life." *Id.* The court reasoned that schools cannot be expected
15 to accommodate the moral or religious concerns of every parent, as such an obligation would be
16 impossible to satisfy. *Id.* Plaintiffs here wish to prevent California from regulating mental
17 health professionals in a manner that contravenes plaintiffs' personal views.

18 The court finds that the parental rights question in this case is resolved by the
19 Supreme Court's decision in *Prince* and the Ninth Circuit's decision in *Fields*. *Prince*, 321 U.S.
20 158; *Fields*, 427 F.3d 1197.

21 c. Privacy Rights

22 Plaintiffs' contention that parents have a protected privacy right in making
23 decisions regarding their children's mental health also fails. (ECF 28 at 19.) As discussed
24 below, the Supreme Court's *Parham* case does not stand for plaintiffs' proposition, and neither
25 does the Ninth Circuit's decision in *Carnohan*, which accords with the Tenth Circuit's
26 *Rutherford* decision. (See ECF 48 at 21-23.)

1 i. *Parham*

2 In *Parham v. J.R.*, minor children sought a declaratory judgment that a Georgia
3 statute enabling parents to voluntarily institutionalize their minor children violated the minors'
4 substantive due process rights. 442 U.S. at 587. The minor plaintiffs contended the statute
5 severely deprived them of liberty, as they could be institutionalized against their will if their
6 parents so elected. *Id.* at 597. Mental health professionals were required to review each
7 proposed patient to ensure institutionalization was warranted. *Id.* Plaintiffs asserted that due
8 process demanded a formal or quasi-formal hearing before institutionalization could occur. *Id.*
9 at 603. The primary constitutional interests in tension were those of the parents against those of
10 the children. *Id.* The Court examined the *Meyer* line of cases to determine its illumination of
11 parents' rights in the face of minors asserting contrary interests. *Id.* at 603. The Court in
12 *Parham* upheld the statute, finding that the mental health professionals' independent prior
13 determination of necessity for each institutionalization was sufficient to prevent commitment in
14 violation of the minors' interests. *Id.* at 602.

15 In *Parham*, unlike here, parents and the state were on the same side; the Court
16 was not deciding a contest between parents' and states' interests, but confirmed parents' right to
17 make mental health decisions on behalf of their minor children but against the children.²¹ In
18 *Parham*, the Court relied on the interests of the state to reach its holding that favored parents'
19 rights. *Id.* at 605-08 (intimating the parents' interests and the state's *parens patriae* interests
20 were aligned). At the same time, the Court recognized "a state is not without constitutional
21 control over parental discretion in dealing with children when their physical or mental health is
22 jeopardized." *Id.* at 603 (citing *Yoder*, 406 U.S. at 230 and *Prince*, 321 U.S. at 366). However,

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24 _____
25 ²¹ Here, there is no indication the interests of the plaintiff parents and children are not
26 aligned. See ECF 71 (court's order granting parents guardian ad litem status). Plaintiff's
argument at hearing that *Parham* requires a showing of more than mere risk is inapposite; such a
rule applies when parents' interests are in tension with their children's interests. *Id.* at 603.

1 the Court distinguished *Yoder* and *Prince* as it did *Meyer* and *Pierce*, as they were not applicable
2 to a conflict between parents and children. *Id.*

3 ii. *Carnohan* and *Rutherford*

4 The cases of *Carnohan* and *Rutherford* are closer than *Parham* to the case at bar.
5 In both cases, terminally-ill cancer patients sought equitable determinations that the federal
6 government could not inhibit them from utilizing a cancer drug the FDA had not approved.
7 *Carnohan*, 616 F.2d at 1121; *Rutherford*, 616 F.2d at 456. The plaintiffs based their claims upon
8 individual privacy interests established in *Roe* and other substantive due process cases.
9 *Carnohan*, 616 F.2d at 1122; *Rutherford*, 616 F.2d at 457. Both courts held that the plaintiffs'
10 protected fundamental right is a patient's decision whether to seek treatment or not; but a
11 patient's "selection of a particular treatment, or at least a medication, is within the area of
12 governmental interest in protecting health." *See Carnohan*, 616 F.2d at 1122 ("Constitutional
13 rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of
14 the lawful exercise of government police power."); *Rutherford*, 616 F.2d at 457. Both cases
15 support the proposition that no privacy right exists to access pharmaceutical treatments the
16 government reasonably has deemed harmful, or has not deemed safe.²²

17 By analogy, plaintiffs in this case do not have a fundamental right to receive a
18 therapy that California has deemed harmful and ineffective. *Carnohan*, 616 F.2d at 1122;
19 *Rutherford*, 616 F.2d at 457; *see also NAAP*, 228 F.3d at 1050 ("substantive due process rights
20 do not extend to the choice of type of treatment"; noting Seventh Circuit's conclusion that
21 "most federal courts have held that a patient does not have a constitutional right to obtain a
22 particular type of treatment . . . if the government has reasonably prohibited that type of
23 treatment" (quoting *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1994)). California's
24

25 ²² Contrary to plaintiffs' assertions at hearing, laetrile was not a controlled substance. It
26 was subject to regulation under the Federal Food, Drug, and Cosmetic Act. *Carnohan*, 616 F.2d
at 1121.

1 governmental interest in protecting public health, deriving from its police power, enables it to
2 prohibit certain treatments without infringing on plaintiffs' fundamental privacy rights. The
3 plaintiffs in *Carnohan* and *Rutherford* did not prevail despite having been diagnosed with
4 terminal cancer. Plaintiffs in this action are seeking treatment in the face of the Legislature's
5 reasonable determination that there is no illness to treat. Although plaintiffs here base their
6 claim upon the *Meyer* line of parental rights cases, and not upon the individual privacy and
7 liberty rights addressed in *Rutherford* and *Carnohan*, the Supreme Court as noted has intimated
8 that these rights are simple variations of a single constitutional right. *Runyon*, 427 U.S. at 179
9 n.15. This court finds no meaningful distinction to make a difference here. SB 1172 thus is
10 subject to rational basis review.

11 c. The Rational Basis Test

12 While plaintiffs' briefing focuses on strict scrutiny, ECF 28 at 22, plaintiffs'
13 counsel clarified his position at argument that SB 1172 also fails the rational basis test. Plaintiffs
14 argue that California's legislative findings provide no concrete evidence that SOCE harms
15 minors, taking aim in particular at the APA Task Force report and asserting it concedes there
16 have been no studies of SOCE's harmfulness to children or adolescents. (*Id.* at 22; ECF 60 at 3-
17 5, 11.) Plaintiffs provide declarations in support of their contention that the APA report is
18 "scientifically flawed, biased," based upon anecdotal and speculative policy statements, and
19 presents no consensus on SOCE's efficacy, even on adults. (ECF 60 at 4, 11.)

20 Defendants argue that SB 1172 does satisfy the rational basis standard. They
21 assert that states have a compelling, not just legitimate, interest in regulating access to mental
22 health treatments and providers and that the California Legislature rationally determined that SB
23 1172 would promote this important interest. (ECF 48 at 22, 24-25.) Defendants claim this
24 legislative determination was based on "hard data and expert opinion," that at a minimum:
25 1) SOCE therapy is unproven and potentially harmful; and 2) homosexuality is not a disease or
26 condition that warrants treatment. (*Id.* at 25.)

1 The APA report on which the Legislature relied includes the following:

2 [T]here is a dearth of scientifically sound research on the safety of
3 SOCE. Early and recent research studies provide no clear
4 indication of the prevalence of harmful outcomes among people
5 who have undergone efforts to change their sexual orientation or
6 the frequency of occurrence of harm because no study to date of
7 adequate scientific rigor has been explicitly designed to do so.
8 Thus, we cannot conclude how likely it is that harm will occur
9 from SOCE. However, studies . . . indicate that attempts to change
10 sexual orientation may cause or exacerbate distress and poor
11 mental health in some individuals, including depression and
12 suicidal thoughts.

13 (ECF 54-1 at 50.) The APA report also “found no empirical evidence that providing any type of
14 therapy in childhood can alter adult same-sex orientation.” (*Id.* at 87.)

15 As noted above, the California Legislature also relied upon the expertise of nine
16 other mental health professional organizations who have discouraged or opposed SOCE as a
17 “cure” for homosexuality. SB 1172 § 1(a)-(l). Some of these organizations deem SOCE a
18 violation of ethical principles. SB 1172 § 1(l). The Legislature also cited to studies indicating
19 minors who face family rejection based on their sexual orientation face especially serious health
20 risks. SB 1172 § 1(m).

21 On the record before it, the court concludes that SB 1172 is “rationally related to
22 a legitimate state interest.” *See Fields*, 427 F.3d at 1208.²³ SB 1172's stated purpose is the
23 protection of the “physical and psychological well-being of minors.” SB 1172 § 1(n). This is
24 more than a “legitimate” interest: it is a significant, if not compelling, interest according to
25 Supreme Court precedent. *Ferber*, 458 U.S. at 756; *Yoder*, 406 U.S. at 230; *Prince*, 321 U.S. at
26 166. SB 1172 is rationally related to this interest because it prohibits a therapeutic practice
deemed unproven and potentially harmful to minors by ten professional associations of mental
health experts. Even assuming plaintiffs’ criticisms of the APA report are true, plaintiffs still
have not carried their burden of demonstrating that the facts on which the Legislature says SB

²³ Because rational basis review applies here, plaintiffs’ reliance on *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (2009), is misplaced.

1 1172 is based cannot “reasonably be conceived to be true by the governmental decisionmaker.”
2 *NAAP*, 228 F.3d at 1050. The findings, recommended practices, and opinions of ten professional
3 associations of mental health experts is no small quantum of information. Even if all of the
4 studies and reports upon which the California Legislature relied were inconclusive or flawed, SB
5 1172 still would be a valid legislative enactment. A legislative choice such as this “is not subject
6 to courtroom fact-finding and may be based on rational speculation unsupported by evidence or
7 empirical data.” *FCC v. Beach Commc ’ns, Inc.* 508 U.S. 307, 315 (1993); *see also Ginsberg*,
8 390 U.S. at 642-43 (finding a statute prohibiting the sale of obscene materials to minors had a
9 rational basis even though studies about its harmfulness were inconclusive); *Moore v. Detroit*
10 *Sch. Reform Bd.*, 293 F.3d 352, 370-71 (6th Cir. 2002) (upholding state law as rational even
11 though legislature relied upon “anecdotes collected from newspapers” rather than studies).

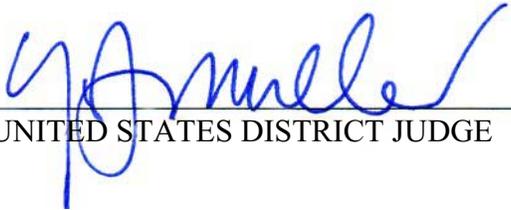
12 SB 1172 need not “actually advance its stated purpose”; it is enough that “the
13 government could have had a legitimate reason for acting as it did.” *NAAP*, 228 F.3d at 1050.
14 The court need not engage in an exercise of legislative mind reading to find the California
15 Legislature and the state’s Governor could have had a legitimate reason for enacting SB 1172.

16 V. CONCLUSION

17 For the reasons set forth above, plaintiffs’ motion for a preliminary injunction is
18 DENIED.

19 IT IS SO ORDERED.

20 DATED: December 4, 2012.

21
22 
23 UNITED STATES DISTRICT JUDGE
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